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**Golden Stevedoring Co., Inc.\* and International Longshoremen's Association, AFL-CIO, South Atlantic and Gulf Coast District.** Cases 15-CA-13334(E), 15-CA-13394(E), 15-CA-13601(E), 15-CA-13870(E), 15-CA-13871(E), 15-CA-14186(E), 15-CA-14209(E), and 15-CA-14314(E)

September 30, 2004

#### SUPPLEMENTAL DECISION AND ORDER

BY CHAIRMAN BATTISTA AND MEMBERS SCHAUMBER  
AND WALSH

On November 21, 2001, Administrative Law Judge Keltner W. Locke issued the attached supplemental decision. The Applicant, Golden Stevedoring Co., Inc., filed exceptions and a supporting brief.<sup>1</sup>

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the supplemental decision and the record in light of the request for review and brief and has decided to affirm the judge's rulings, findings, and conclusions as modified herein, and to adopt his recommended Order.

The judge denied the Applicant's request for fees and expenses under the Equal Access to Justice Act (EAJA).<sup>2</sup> Although we agree with the judge that the application should be denied, we do not adopt his entire rationale. More specifically, we find that even if the General Counsel was not substantially justified as to paragraph 7(b) of the complaint, and even if that paragraph was a "discrete" substantive portion of the underlying adversary proceeding, it was not a "significant" portion of the underlying adversary proceeding. See Sections 102.143(b) and 104.44 of the Board's Rules and Regulations. In addition, we conclude that the General Counsel's overall position is substantially justified.

\* The judge inadvertently omitted the complete name of the Applicant.

<sup>1</sup> The Applicant also filed a request for special permission to appeal the ruling of the judge dismissing its application for fees and expenses, as well as a brief in support thereof. Pursuant to Sec. 102.150(a) of the Board's Rules, review of an order granting a motion to dismiss an application for fees and expenses may be obtained by following the provisions of Sec. 102.27 of the Board's Rules. Pursuant to Sec. 102.27, we shall treat the Applicant's exceptions and its request for special permission to appeal as a request for review. We find that the application for fees should be dismissed under any standard of review utilized by the Board. See *Electrical Workers Local 3 (Telecom Plus)*, 280 NLRB 265 fn. 1 (1986).

<sup>2</sup> 5 U.S.C. § 504.

On August 27, 2001, the Board issued a Decision and Order finding that the Respondent (the Applicant) engaged in certain violations of the Act, as alleged, and dismissing certain other allegations of the unfair labor practice complaint. *Golden Stevedoring Co.*, 335 NLRB 410 (2001).

Of particular relevance here is complaint paragraph 7(b), alleging that the Applicant threatened its employees with discharge for engaging in union activities. At the unfair labor practice hearing, the Applicant moved to dismiss complaint paragraph 7(b) for lack of proof. Counsel for the General Counsel stated that he had "no defense" to the motion to dismiss and admitted that he had no evidence to support the allegations of paragraph 7(b). The judge thereupon granted the Applicant's motion to dismiss. *Id.* at 455. No exceptions were filed to the judge's ruling and, accordingly, the Board adopted the judge's dismissal of complaint paragraph 7(b).

On September 26, 2001, the Applicant applied to the Board for an award of fees and expenses that it incurred in defending against the complaint allegations that the General Counsel pursued through trial and which were dismissed by the judge. The application alleged that the General Counsel's position during this stage of the proceeding was not substantially justified. The General Counsel filed a motion to dismiss the application, claiming, *inter alia*, that his position throughout this phase of the proceeding was substantially justified, notwithstanding that the Applicant ultimately was the prevailing party as to the complaint allegations dismissed by the judge.<sup>3</sup>

The judge found that in each instance in which the Applicant prevailed on a particular complaint paragraph,

<sup>3</sup> The Applicant's EAJA application did not seek reimbursement for any time spent in responding to the General Counsel's exceptions to the judge's dismissal of certain complaint allegations, or for any other expenses incurred following issuance of the judge's decision resolving the complaint allegations. However, in its combined special appeal brief and brief excepting to the judge's supplemental decision denying an EAJA award, the Applicant raises for the first time, and only in a concluding sentence of its brief, that the Board should remand this case to the judge to consider "whether the General Counsel was substantially justified in appealing the decision of the . . . judge to the Board . . . ." In addition to being untimely and, thus, not properly before us, we note that the Applicant does not argue or request separate expenses regarding its response to the General Counsel's exceptions, nor does the Applicant provide any reason or rationale why the General Counsel's exceptions to the Board were not substantially justified.

the Applicant prevailed in a significant and discrete substantive portion of the underlying adversary proceeding. The judge also found, contrary to the Applicant, that the General Counsel was substantially justified in each instance in which the Applicant prevailed. The judge made no specific mention of complaint paragraph 7(b). The judge, accordingly, granted the General Counsel's motion to dismiss the application for fees and expenses, and denied the Applicant's request for reimbursement of fees and expenses.

Under EAJA, a party who has prevailed in an adversary proceeding before a Federal Government agency may be reimbursed for fees and expenses incurred in connection with that proceeding, unless the agency's position was substantially justified. Section 102.143(b) of the Board's Rules and Regulations states that a party who prevails in an adversary proceeding, "or in a significant and discrete substantive portion of that proceeding," may seek reimbursement under EAJA. Section 102.44 of the Board's Rules and Regulations provides that "[a]n eligible applicant may receive an award . . . in connection with a significant and discrete substantive portion of [the] proceeding, unless the position of the General Counsel . . . was substantially justified."

There are, therefore, two distinct issues presented. The first issue is whether the applicant is a party who prevailed in the adversary proceeding or in a "significant and discrete substantive portion" of the proceeding. The second issue is whether the General Counsel's position in the proceeding was substantially justified.

As stated above, the judge found that each paragraph of the complaint on which the Applicant prevailed was itself a "significant and discrete substantive portion" of the underlying adversary proceeding. Although no party specifically contests that finding, the Board is not required to adopt it.<sup>4</sup>

In our view, an EAJA claimant can succeed where the allegations, as an inclusive whole, were not substantially justified. *Glesby Wholesale, Inc.*, 340 NLRB No. 128, slip op. at 2 (2003). If the claimant shows only that particular allegation(s) were not substantially justified, the claimant will not succeed. See *Glesby*, supra. However, if the claimant shows those particular allegations are a "discrete and significant" portion of the case, and there is no substantial justification therefor, the claimant can succeed.<sup>5</sup>

<sup>4</sup> It is well established that "[e]ven absent an exception, the Board is not compelled to act as a mere rubber stamp for its [judge]. . . . The Board [is] free to use its own reasoning and [is] not bound by that of the [judge]." *NLRB v. WTVJ, Inc.*, 268 F.2d 346, 348 (5th Cir. 1959).

<sup>5</sup> See Secs. 102.143(b) and 102.44 of the Rules and Regulations.

In the instant case, the Respondent has shown that there was no substantial justification for paragraph 7(b) of the complaint. We assume arguendo that paragraph 7(b) is a discrete portion of the case. However, we conclude that it is not a significant part of the case. Thus, we disagree with the judge that paragraph 7(b) was a "significant and discrete" portion of the case. Paragraph 7(b) alleged a single threat of discharge. There were 19 other allegations. They included a myriad of 8(a)(1) allegations, suspensions, warnings, reductions of hours; a refusal to reinstate unfair labor practice strikers; and a host of unilateral changes. In these circumstances, we conclude that paragraph 7(b), alleging a single threat of discharge, was not a "significant" part of the entire case.

Looking at the General Counsel's position on the complaint allegations as an inclusive whole, we find that the General Counsel was substantially justified. In fact, the General Counsel was the party who prevailed on the complaint allegations of threats of plant closure, threats to cause the arrest of union officials, warning and suspending employees because of their union activities, refusing to reinstate economic strikers, creating the impression of surveillance, and unilaterally changing the disciplinary system. With respect to the complaint allegations on which the Applicant prevailed other than paragraph 7(b),<sup>6</sup> the judge stated that his credibility resolutions were either "the decisive factor" or "an important factor." We agree with the judge's reasoning that, in such circumstances, the General Counsel's decision to litigate these issues had a reasonable basis in fact and law, and was substantially justified. *David Allen Co.*, 335 NLRB 783, 784-785 (2001) ("[W]here the General Counsel is compelled by the existence of a substantial credibility issue to pursue the litigation, and thereafter presents evidence, which, if credited, would constitute a prima facie case, the General Counsel's case has reasonable basis in fact and law and is substantially justified.").

Given the allegations on which the General Counsel prevailed, and the substantial justification for all except one of the allegations that were dismissed, we conclude that the General Counsel's overall position is substantially justified. And as to complaint paragraph 7(b), as to which the General Counsel presented no evidence, we conclude that it was not a "significant" portion of the case.

<sup>6</sup> The dismissed allegations include the following: threats of discharge and futility of union representation, discriminatory written warnings, discriminatory reduction in work hours, adversely affecting the work hours of employees, refusing to reinstate employees after the strike, refusing to reemploy an employee, and unilaterally changing the policy on assignment of work.

## ORDER

The recommended Order of the administrative law judge is adopted, and the application is denied.

Dated, Washington, D.C. September 30, 2004

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Robert J. Battista, Chairman

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Peter C. Schaumber, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

MEMBER WALSH, concurring.

I agree with my colleagues, for the reasons they state, that the General Counsel's position "as an inclusive whole" was substantially justified and that, therefore, the application for fees and expenses under the Equal Access to Justice Act (EAJA) should be denied. *Glesby Wholesale, Inc.*, 340 NLRB No. 128, slip op. at 2 (2003) ("While the parties' positions on individual matters may be more or less justified, the EAJA . . . favors treating a case as an inclusive whole rather than as atomized line-items.") (quoting *Commissioner, INS v. Jean*, 496 U.S. 154, 161-162 (1990)). Our holding that the General Counsel was substantially justified fully disposes of the question before us of whether the Applicant is entitled to an award under EAJA.

I write separately to disassociate myself from my colleagues' discussion of whether paragraph 7(b) of the complaint constituted a "significant and discrete substantive portion of [the] proceeding" within the meaning of Section 102.143(b) of the Board's Rules and Regulations.<sup>1</sup> Given our holding on the "substantial justification" issue as a whole, it is unnecessary to reach the "significant and discrete" issue and, therefore, I do not join my colleagues in their discussion of this latter issue. See *Roanoke River Basin Assn. v. Hudson*, 991 F.2d 132, 138 fn. 5 (4th Cir. 1992), cert. denied 510 U.S. 864 (1993) ("Because we affirm the district court on the grounds that the government's position is substantially

<sup>1</sup> Sec. 102.143(b) provides that a respondent who "prevails" in an adversary proceeding, "or in a significant and discrete substantive portion of that proceeding," and who otherwise meets the eligibility requirements, may seek reimbursement of fees and expenses under EAJA. Sec. 102.44 provides that "[a]n eligible applicant may receive an award . . . in connection with a significant and discrete substantive portion of [the] proceeding, unless the position of the General Counsel . . . was substantially justified."

justified, we do not reach the question of whether the court erred in concluding that the Association is a prevailing party.").

Dated, Washington, D.C. September 30, 2004

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Dennis P. Walsh, Member

## NATIONAL LABOR RELATIONS BOARD

*Christ J. Doyle, Esq.*, for the General Counsel.

*Willis C. Darby Jr., Esq.*, of Mobile, Alabama, for the Respondent.

## SUPPLEMENTAL DECISION AND ORDER

KELTNER W. LOCKE, Administrative Law Judge. This is a Supplemental Decision and Order concerning Respondent's application for an award of allowable fees and expenses (the application) pursuant to the Equal Access to Justice Act (EAJA), 5 U.S.C. § 504 and Section 102.143 of the Rules and Regulations of the National Labor Relations Board (the Board). Because I find that the General Counsel was substantially justified in litigating the allegations in question, I deny the Respondent's application.

## I. PROCEDURAL HISTORY

On November 30, 1995, the Regional Director for Region 15 of the Board, acting on behalf of the General Counsel, began the litigation in this matter by issuing an order consolidating cases, consolidated complaint and notice of hearing. The Regional Director subsequently amended the consolidated complaint.

On July 28, 1997, I opened a hearing in this matter in Mobile, Alabama. The hearing closed on October 3, 1997.

On July 28, 1998, I issued a decision which concluded that the General Counsel had proven some of the allegations raised in the consolidated complaint, as amended, but had not proven certain of the other allegations.

On August 27, 2001, the Board issued a Decision and Order which adopted the portions of my decision relevant here.

On September 26, 2001, the Respondent filed its application for fees and expenses under the Equal Access to Justice Act.

On September 27, 2001, the Board, by its Executive Secretary, issued an Order referring this matter to me.

On October 30, 2001, the General Counsel filed a timely motion to dismiss the Respondent's application.

Neither the Respondent's application nor the General Counsel's motion to dismiss requested a hearing. I conclude that a hearing is not necessary.

## II. RESPONDENT'S FINANCIAL ELIGIBILITY

The Equal Access to Justice Act (EAJA) and Section 102.143 of the Board's Rules and Regulations include eligibility requirements. A corporation which has a net worth exceeding \$7 million or which has more than 500 employees is ineligible for relief. To establish its eligibility, Respondent submit-

ted financial documentation along with its application. Based on this documentation, I find that Respondent meets the net worth and employment eligibility requirements to receive an award under EAJA.

Respondent also filed a motion to withhold confidential financial information from public disclosure, and later amended that motion. In its motion, Respondent asserts that public disclosure of the confidential financial information “would aid the competitors of Golden Stevedoring Co., Inc. in the Port of Mobile.”

I grant Respondent’s motion and direct that the financial exhibit remained sealed in accordance with the provisions of Section 102.147(g) of the Board’s Rules and Regulations.

### III. THE RESPONDENT’S APPLICATION

In its application, Respondent states that it prevailed with respect to allegations raised in the following paragraphs of the fifth consolidated complaint: 7(b), 8(a), (b), and (f), 9, 10, 11, 12, 13, 15, 17 (with respect to alleged discriminatees Mike Linsey and James Lambert), 18, and 24. Respondent asserts that the position of the General Counsel was not substantially justified with respect to these allegations. Respondent seeks an award of fees totally \$99,279.50, “\$1,452.80 for preparation of statistical tables relating to paragraphs 12 and 24 of the Fifth Consolidated Complaint, and \$4,638 in expenses.” The General Counsel opposes any award of fees or expenses.

### IV. THE GENERAL COUNSEL’S MOTION TO DISMISS

In his motion to dismiss, the General Counsel raised several arguments. The General Counsel contended that the Respondent did not cooperate fully with respect to the investigation of all the allegations in the complaint.

Further, the General Counsel asserts that Respondent did not prevail in a significant and discrete substantive portion of the proceedings. Additionally, the General Counsel asserts that he was substantially justified in all instances in which Respondent ultimately prevailed.

### V. APPLICABLE STANDARDS

Section 102.143(b) of the Board’s Rules and Regulations states that “[a] respondent in an adversary adjudication who prevails in that proceeding, or in a significant and discrete substantive portion of that proceeding, and who otherwise meets the eligibility requirements of this section, is eligible to apply for an award of fees and other expenses . . .”

Section 102.144 of the Board’s Rules and Regulations sets forth the standards for awards and allocates the burden of proof. It states:

(a) An eligible applicant may receive an award for fees and expenses incurred in connection with an adversary adjudication or in connection with a significant and discrete substantive portion of that proceeding, unless the position of the General Counsel over which the applicant has prevailed was substantially justified. The burden of proof that an award should not be made to an eligible applicant is on the General Counsel, who may avoid an award by showing that the General Counsel’s position in the proceeding was substantially justified.

(b) An award will be reduced or denied if the applicant has unduly or unreasonably protracted the adversary adjudication or if special circumstances make the award sought unjust.

In *Galloway School Lines*, 315 NLRB 473 (1994), the Board explained what constitutes “substantial justification.” It stated, in part:

The Board has stated that substantial justification does not mean substantial probability of prevailing on the merits, and that it is not intended to deter the agency from bringing forward close questions or new theories of law. The Supreme Court has defined the phrase “substantial justification” under EAJA as “justified to a degree that could satisfy a reasonable person” or having a “reasonable basis both in law and fact.” *Pierce v. Underwood*, 487 U.S. 552, 565 (1988). Thus, in weighing the unique circumstances of each case, a standard of reasonableness with apply.

Id. at 473 (fns. omitted). See also *Meaden Screw Products Co.*, 336 NLRB 298 (2001).

After a charge is filed, Board agents conduct an investigation. In deciding whether to issue a complaint, the Regional Director considers this evidence, which includes affidavits provided by witnesses. Customarily, the Regional Director does not determine which of the witnesses interviewed during the investigation should be believed, and which should not. Rather, that function rests with the administrative law judge, who observes the witnesses as they testify under oath and respond to cross-examination.

After observing witnesses under the exacting conditions of a trial, the judge may decide that the General Counsel has not proven a particular complaint allegation because the witness who testified about this allegation was not credible. The judge reaches a conclusion that certain testimony is dross rather than gold only after that testimony has been tested in the crucible of a courtroom. Such a conclusion does not imply that it was unreasonable for the Regional Director to rely on the pretrial statements of a witness in deciding what allegations to plead in the complaint. As the Board stated in *David Allen Co.*, 335 NLRB 783 (2001):

Credibility issues which are not subject to resolution by the General Counsel in the investigative stage of a proceeding on the basis of documents or other objective evidence are, in the first instance, the exclusive province of the administrative law judge. Accordingly, where the General Counsel is compelled by the existence of a substantial credibility issue to pursue the litigation, and thereafter presents evidence which, if credited, would constitute a prima facie case, the General Counsel’s case has a reasonable basis in law and fact and is substantially justified. *Barrett’s Contemporary & Scandinavian Interiors*, 272 NLRB 527 (1984).

### Discussion

#### A. The “Significant and Discrete Substantive Portion” Issue

As described above, the Respondent’s application asserts that Respondent prevailed with respect to the allegations raised

by certain identified paragraphs in the complaint. The General Counsel contends that the allegations raised in a particular complaint paragraph do not necessarily constitute a “significant and discrete substantive portion” of the proceeding, as that term is used in Section 102.143 of the Board’s Rules and Regulations.

For example, the General Counsel argues that complaint paragraphs 8(d) and (e) were so “factually and intimately connected” that paragraph 8(d), on which Respondent prevailed, could not be considered a significant and discrete substantive portion of the proceeding. Specifically, paragraph 8(d) alleged that Respondent threatened a union official with arrest if he engaged in union or concerted activities on the Alabama State docks and paragraph 8(e), on which the General Counsel prevailed, alleged that Respondent attempted to arrest a union official because he was engaged in union activities on the Alabama State docks.

It is difficult for me to view the allegations in paragraphs 8(d) and (e) as anything but discrete because, if the two did not have separate elements, my decision could not have found that the government had proven one allegation but not the other. Moreover, the fact that the General Counsel placed these two allegations in different complaint paragraphs suggests that I am not alone in viewing them as individual and discrete.

However, the Board’s Rules require, for EAJA purposes, that the portion on which Respondent prevailed be in a *significant* and discrete substantive portion of the adversary proceeding. Arguably, the allegations in two complaint paragraphs might be discrete and yet not significantly different to constitute a separate substantive portion of the adversary proceeding.

In the present case, the substance of the violation alleged in complaint paragraph 8(d) is quite different from the substance of the violation alleged in complaint paragraph 8(e). The former concerns allegedly unlawful statements made in letters which Respondent delivered to Union Representative Bru. My decision found that the statements in these letters did violate the Act.

On the other hand, the General Counsel did not prove the allegations in complaint paragraph 8(e), which did not concern statements Respondent’s agents made to Bru but rather communications which Respondent allegedly had with the police in an attempt to have them arrest the union official. In dismissing this allegation, my decision drew a distinction between asking the police to investigate and asking the police to arrest. The decision stated:

The Union was on strike against Respondent, and the record establishes that at times, there were instances of misconduct associated with the picketing. Asking the police to find out if a union official had a legitimate reason for being on the Docks in the vicinity of Respondent’s employees is quite different from insisting that the police arrest this person regardless of probable cause.

Significantly, the General Counsel had to present and rely on different evidence to establish the allegations raised in the two complaint paragraphs. To prove the allegations in complaint paragraph 8(d), the Government elicited testimony from Bru that Respondent’s employees had hand delivered the letters to

him. The General Counsel also introduced the letters into evidence.

By comparison, to prove complaint paragraph 8(e), the General Counsel had to rely on evidence regarding a communication between Respondent and the police. To prove the facts about this communication, the government had to present evidence separate from the letters and testimony it offered to prove complaint paragraph 8(d). Since the facts needed to establish these two allegations were different, the evidence which Respondent had to present to defend against these allegations had to be different.

Moreover, the allegations of paragraphs 8(d) and (e) raised different legal issues. To determine whether the General Counsel had proven the violation alleged in paragraph 8(d), I had to consider whether the recipient of the letters, Union Official Bru, met the statutory definition of “employee,” and even if he did, whether the statements in question constituted a violation of Section 8(a)(1) of the Act.

On the other hand, to decide whether Respondent had violated the Act by the conduct alleged in complaint paragraph 8(e), I had to consider whether Respondent’s communication with police constituted an attempt to have Bru arrested. Since the two complaint paragraphs involved different legal issues, Respondent had to defend against them separately.

Considering that the allegations in paragraphs 8(d) and (e) required the proof of different facts and the application of different legal principles, I must conclude that they were significantly different. Therefore, I reject the General Counsel’s argument that when Respondent prevailed on complaint paragraph 8(e), it did not amount to prevailing in a significant and discrete portion of the adversary proceeding.

For similar reasons, I conclude that in all instances in which Respondent prevailed on the issues raised in a particular complaint paragraph, that action constituted prevailing on a significant and discrete substantive portion of the adversary proceeding.

#### *B. The “Substantially Justified” Issue*

The General Counsel bears the burden of showing that, in each instance in which Respondent prevailed, the Government’s position had substantially justified. For the following reasons, I find that to be the case.

In the underlying unfair labor practice case, in each and every instance in which I determined that the General Counsel had not proven a particular complaint allegation, I based that conclusion in significant part on the credibility of the various witnesses. My credibility resolutions were the decisive factor with respect to most of these dismissed allegations. But even when credibility was not the only reason for recommending dismissal, it was an important factor.

For example, credibility was not the sole factor I considered in recommending the dismissal of the allegations raised by paragraphs 12 and 24 of the consolidated complaint, as amended. Paragraph 12 alleged that “since about August 2, 1995, Respondent has reduced the work hours of its employees by utilizing temporary employees to perform work previously performed by bargaining unit members.” Paragraph 24 alleged that “about August 2, 1995, Respondent changed its policy for

assignment of work at its facility thereby reducing the hours of employment for bargaining unit members.” Other complaint paragraphs alleged that these actions constituted unfair labor practices.

To prove these allegations, the General Counsel partly relied on statistical evidence based on Respondent’s records. My decision found fault with the General Counsel’s methodology. Obviously, my examination of the statistical evidence and my conclusion that it was not reliable did not depend on deciding whether a particular witness testified accurately.

However, my conclusions did not rest solely on problems with the General Counsel’s statistical method. Even had I found the statistical evidence reliable, it would not have been sufficient, by itself, to carry the General Counsel’s burden of proof. Thus, my decision stated:

[E]ven assuming that the payroll records relied upon by the General Counsel did show an increase in the hours worked by temporary employees, these documents do not describe what the temporary employees were doing. The records indicate that the temporaries did something, that Respondent kept track of how much time they spent doing it, and presumably, that Respondent was preparing to pay them for it. However, the time records do not establish whether the temporaries were performing bargaining unit work.

Rather, the General Counsel had to rely upon witnesses as well as records. As discussed at some length in my decision, on these particular issues, I did not find the testimony of the General Counsel’s witnesses to be credible.

Moreover, in resolving these allegations, I particularly relied upon the testimony of Respondent’s superintendent, Kenneth Johnson. In explaining why I credited Johnson, my decision described my impressions of Johnson’s demeanor as a witness. It continued as follows:

Based on his testimony, as well as the absence of credible testimony to the contrary, I find that Respondent did not change the way it assigned temporary workers . . . Similarly, I find that the government has not proven that Respondent has reduced the hours of employment for bargaining unit members.

In other respects, my conclusions rested heavily on the credibility of the witnesses. Had I credited the General Counsel’s witnesses, their testimony might well have overcome the ambiguities and vagueness of the documentary evidence. Therefore, I conclude that the General Counsel’s decision to

litigate these issues had a reasonable basis in law and fact, and was substantially justified.

My credibility determinations played a similarly important role in deciding all allegations in which I found that the evidence did not establish the violation alleged. In accordance with *David Allen Co.*, supra, I conclude that the General Counsel’s decision to litigate these issues had a reasonable basis in law and fact, and was substantially justified.

In view of this conclusion, I need not decide whether the extent to which Respondent cooperated, or did not cooperate, in the precomplaint investigation affected the General Counsel’s substantial justification in alleging particular matters in the complaint.

#### CONCLUSIONS OF LAW

1. Respondent, Golden Stevedoring Co., Inc., is eligible to receive fees and expenses under the Equal Access to Justice Act and Section 102.143 of the Board’s Rules and Regulations.

2. Respondent prevailed in certain significant and discrete substantive portions of the unfair labor practice proceedings in this matter.

3. In all instances in which Respondent prevailed, the General Counsel was substantially justified in alleging and litigating the particular allegations in question.

Having concluded that the General Counsel has met the burden of proving that his position in this proceeding was substantially justified with respect to every allegation on which Respondent prevailed, I issue the following recommended<sup>1</sup>

#### ORDER

The Respondent’s motion to withhold confidential financial information from public disclosure, as amended, is granted.

The General Counsel’s motion to dismiss the Respondent’s application for an Award of Allowable Fees and Expenses is granted.

The Respondent’s Application for an Award of Allowable Fees and Expenses is hereby dismissed.

Dated at Washington, D.C. November 21, 2001

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<sup>1</sup> If no exceptions are filed as provided by § 102.154 of the Board’s Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in § 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.